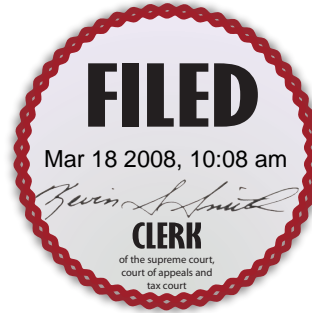


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CARL McCUTCHEON,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 49A05-0707-CR-413

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Tonya Walton-Pratt, Judge  
Cause No. 49G01-0608-FB-152048

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**March 18, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Carl McCutcheon (“McCutcheon”) was convicted in Marion Superior Court of Class B felony rape. Upon appeal, McCutcheon presents three issues, which we consolidate and restate as whether the procedure used by the trial court to determine the victim’s competency as a witness constituted fundamental error denying McCutcheon the right to confront his accuser.

We affirm.

### **Facts and Procedural History**

At the time relevant to this appeal, McCutcheon lived with his sister, Mary Hayden (“Mary”), and her husband, Charles Hayden (“Charles”). McCutcheon slept in the garage of the Hayden house. C.H., a close family friend who was severely mentally disabled, was a frequent visitor to the Hayden house. On August 13, 2006, Mary found McCutcheon lying asleep next to C.H. in the garage. C.H. was unclothed from the waist down. Upset by this, Mary told her husband what she had found and took C.H. home. Charles woke McCutcheon up and told him to leave the house, which McCutcheon refused to do. Charles then telephoned the police. Mary and C.H.’s mother took C.H. to the hospital where she underwent a sexual assault examination. The examination revealed vaginal bruising and redness. During the subsequent investigation, McCutcheon’s DNA was found inside C.H.’s vagina and on a bite-mark on C.H.’s skin. C.H.’s DNA was found on McCutcheon’s jeans.

On August 15, 2006, the State charged McCutcheon with Class B felony rape pursuant to Indiana Code section 35-42-4-1(a)(3) (2004), alleging that McCutcheon “did knowingly have sexual intercourse with [C.H.], a member of the opposite sex, when

[C.H.] was so mentally disabled or deficient that consent to sexual intercourse c[ould] not be given.” Appellant’s App. p. 24. At the beginning of McCutcheon’s jury trial, the State called C.H. as a witness. After questioning by both the State and McCutcheon’s trial counsel regarding C.H.’s ability to understand the oath, the trial court found C.H. to not be competent to testify because she was unable to understand the nature and obligation of an oath. The State proceeded to present evidence regarding C.H.’s mental disabilities. At the conclusion of the trial, the jury found McCutcheon guilty as charged. The trial court sentenced McCutcheon to fifteen years, with three years suspended to probation. McCutcheon now appeals.

### **Discussion and Decision**

McCutcheon argues that the trial court erred by not following the proper procedure to determine whether C.H. was competent to testify. As explained in Hughes v. State, 546 N.E.2d 1203, 1209 (Ind. 1989), when the competency of a witness to testify is placed in issue, the trial court should schedule a hearing to determine whether the witness is in fact competent to testify. The test of witness competency is “whether the witness has sufficient mental capacity to perceive, to remember, to narrate the incident he has observed, and to understand and appreciate the nature and obligation of an oath.” Id. If the evidence places the witness’s competency in doubt, the trial court should order the witness to be examined by a psychiatrist unless the State can show a paramount interest in denying the petition. Id. The determination of a witness’s competency is a matter committed to the sound discretion of the trial court, whose determination is reviewable only when a manifest abuse of discretion has occurred. Id.

McCutcheon complains that the trial court did not follow this procedure. Instead, the trial court allowed C.H. to be put on the witness stand in the presence of the jury, where both parties had the opportunity to ask her questions to determine whether she could understand the nature of an oath. McCutcheon acknowledges, however, that he did not make any specific objection to the procedure used by the trial court to determine C.H.'s competency as a witness. For this reason, he has forfeited this issue for purposes of appellate review. See Lewis v. State, 755 N.E.2d 1116, 1122 (Ind. Ct. App. 2001). McCutcheon attempts to avoid forfeiture by arguing instead that the procedure used by the trial court amounted to "fundamental error."

Our supreme court has emphasized the "extremely narrow" applicability of the fundamental error doctrine:

A fundamental error is a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant. It applies only when the actual or potential harm cannot be denied. The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. An appellate court receiving contentions of fundamental error need only expound upon those it thinks warrant relief. It is otherwise adequate to note that the claim has not been preserved.

Carter v. State, 754 N.E.2d 877, 881 (Ind. 2001) (citations and internal quotations omitted). McCutcheon has not convinced us that the trial court's handling of the issue of C.H.'s competency fits within the extremely narrow confines of the fundamental error doctrine.

It appears the trial court here was aware that it was unlikely that C.H. would be a competent witness.<sup>1</sup> As such, it should have held a separate competency hearing as per Hughes, supra. However, McCutcheon never requested such a hearing. Although McCutcheon now claims that he was denied the right to cross-examine C.H., we note that C.H. never actually testified. At most, she was questioned by both parties as to whether she could tell the difference between the truth and a lie. It was obvious that she could not. Importantly, C.H. was never questioned regarding the events that led to the charges against McCutcheon. Indeed, she was only briefly on the witness stand; her entire questioning takes up eight pages of a three hundred fifty-five page trial transcript.

McCutcheon claims that C.H. “testified” in the sense that the jury was able to observe her appearance and demeanor. But he never explains how, if given the opportunity, he would have cross-examined an obviously incompetent witness regarding her appearance and demeanor. Moreover, the State presented ample evidence regarding C.H.’s lack of ability to consent to sexual intercourse with McCutcheon. C.H. had been diagnosed as “severely mentally retarded” since childhood and had an IQ in the range of 20 to 35. McCutcheon’s brother-in-law testified that his seven-year-old daughter could boss C.H. around. C.H.’s mother testified that C.H. had to be supervised in her activities ninety percent of the time. Thus, aside from C.H.’s brief appearance before the jury, there was plenty of other evidence from which the jury could determine that C.H. could not consent to sexual intercourse with McCutcheon.

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<sup>1</sup> Indeed, C.H. soiled herself shortly before being put on the witness stand.

We further note that the trial court admonished the jury that its determination that C.H. was not competent to testify was not a determination of C.H.'s mental ability to consent to sexual intercourse with McCutcheon. The trial court also instructed the jury that any "testimony" from C.H. should be disregarded. On appeal, we presume that the jury followed the trial court's instructions. See Scalissi v. State, 759 N.E.2d 618, 623 (Ind. 2001). Under these facts and circumstances, we cannot say that the methods used by the trial court to determine C.H.'s competency amounted to fundamental error.

Affirmed.

FRIEDLANDER, J., and ROBB, J., concur.